

EXHIBIT 1

The Intercept Some Facts About How NSA Stories Are Reported

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(updated below)

Several members of the august “US Journalists Against Transparency” club are outraged by revelations [in yesterday’s New York Times](#) (jointly published by *der Spiegel*) that the NSA has been hacking the products of the Chinese tech company Huawei as well as Huawei itself at exactly the same time (and in exactly the same way) as the US Government has been claiming the Chinese government hacks. Echoing the script of national security state officials, these journalists argue that these revelations are unjustified, even treasonous, because this is the type of spying the NSA should be doing, and disclosure serves no public interest while harming American national security, etc. etc.

True to form, however, these beacons of courage refuse to malign the parties that actually made the choice to publish these revelations – namely, the reporters and editors of *the New York Times* – and instead use it to advance their relentless attack on Edward Snowden. To these journalists, there are few worse sins than “stealing” the secrets of the US government and leaking them to the press (just as was true in the WikiLeaks case, one must congratulate the US Government on its outstanding propaganda feat of getting *its journalists* to lead the war on those who bring transparency to the nation’s most powerful factions). But beyond the abject spectacle of anti-transparency journalists, these claims are often based on factually false assumptions about how these

stories are reported, making it worthwhile once again to underscore some of the key facts governing this process:

(1) Edward Snowden has not leaked a single document to any journalist since he left Hong Kong in June: 9 months ago. Back then, he provided a set of documents to several journalists and asked that we make careful judgments about what should and should not be published based on several criteria. He has played no role since then in deciding which documents are or are not reported. Those decisions are made entirely by media outlets that are in possession of those documents. Thus, calling a new NSA story “Snowden’s latest leak” or asking “why would Snowden decide to publish this now?” – as though he’s doling out documents one by one or deciding which documents should be published – is misleading in the extreme: those decisions are made exclusively by the journalists and editors of those news outlets.

(2) Publication of an NSA story constitutes an editorial judgment by the media outlet that the information *should be public*. By publishing yesterday’s Huawei story, the NYT obviously made the editorial judgment that these revelations *are* both newsworthy and in the public interest, *should* be disclosed, and *will not* unduly harm “American national security.” For reasons I explain below, I agree with that choice. But if you disagree – if you want to argue that this ([or any other](#)) NSA story is reckless, dangerous, treasonous or whatever – then have the courage to take it up with the people who reached the opposite conclusion: in this case, the editors and reporters of the NYT (indeed, as former DOJ official Jack Goldsmith [observed](#), the NYT’s Huawei story was “based on leaks other than the Snowden documents”). In most other cases [where critics claim reckless disclosures](#), the decision to publish was made by *the Washington Post*. The judgment to which you’re objecting – that this information should be made public – was one made by those newspapers, not by Edward Snowden.

(3) Snowden has made repeatedly clear that he did not want all of the documents he provided to be published. When Snowden furnished documents to the journalists with whom he chose to work (which, just by the way, expressly did not include *the NYT*), he made clear that he did not believe all of those materials should be published. Obviously, if he wanted all of those documents published, he could have and would have just uploaded them to the internet himself; he wouldn't have needed to work with journalists.

As he has said repeatedly, he wanted journalists – not himself – to make these decisions based on what is in the public interest and what can be disclosed without subjecting innocent people to harm. He was adamant that not all of the documents he provided were appropriate for publication, and was especially clear (at least to me) that certain categories of documents not be published (which is why those who demand that all documents be released are arguing, even though they won't acknowledge it, that we should violate our agreement with our source, disregard Snowden's conditions for furnishing the documents, and subject him to a wide range of risks he did not want to take). See [here](#) for just a few of the examples where Snowden's wishes in this regard are made clear.

Critics like to pretend that this is some bizarre or unusual arrangement (*why would he provide documents to journalists that he didn't think should be published?*) In fact, this happens all the time: sources come to journalists and say “this set of information I'm giving you is for publication, while this information is only for background use and this other information should stay off the record.” Many of the documents Snowden provided were necessary for background, context and understanding, but not ones he thought should be published (because they could endanger or malign innocent people, or create risks for those involved in the disclosures, or be used to demonize the revelations). Other documents

involved close calls that he believed journalists were better suited to evaluate than himself.

He's made [repeatedly clear](#) since then that he did not want all documents published, but rather wanted a case-by-case assessment made of each, with the ultimate decision to publish resting with journalists, not himself. [Here's how](#) his legal representative, the ACLU's Ben Wizner, recently described Snowden's instructions to journalists:

You know, the number of documents that Edward Snowden has made available to the public is zero. What he did is give information to journalists, with the instruction that they and their editors, in consultation, where necessary, with government officials, decide what was in the public interest to publish, and to withhold information that would be harmful to publish. He wanted to create a protocol that would correct for his own biases. He was someone who had spent the last almost ten years in the intelligence community. He didn't think that his own judgments – and he has very strong judgments about what should or should not be public – were adequate to this moment and wanted to make sure that the institutions that had the experience in doing this – and these are our newspapers, who have long experience competing with the government over access and control of secret information – that that be the way that the information got published. . . .

He didn't want and didn't think that he should have the responsibility to decide which of these documents should be public. He wanted to appeal to the traditions, the institutions, the expertise of the media in helping to make those important judgments. That's what we want whistleblowers to do. We don't want them to unilaterally substitute their judgment for everybody else's. We want them to go through these institutions

that funnel and that channel that and have longer experience in making these kinds of decisions.

As *Time* noted in [a lengthy profile](#) when naming him Person of the Year runner-up: “Snowden does not defend every story that has been written, but he says he tried to design his actions to ensure that he was not the ultimate arbiter of what should and should not become public. ‘**There have of course been some stories where my calculation of what is not public interest differs from that of reporters, but it is for this precise reason that publication decisions were entrusted to journalists and their editors,**’ he told *Time*.”

Now, obviously, anyone is free to agree or disagree with Snowden’s framework for how these materials be handled and reported. I personally think the process of government consultation is often used to suppress newsworthy information, though for the NSA stories I’ve worked on, government arguments to suppress information have been rejected in at least 99% of the cases; I also think non-traditional outlets such as WikiLeaks have done a superior job in many cases with reporting classified documents than government-loyal traditional outlets.

But what you shouldn’t feel free to do is ignore that this is the framework on which Snowden insisted. You shouldn’t demand that journalists violate their agreements with him (by publishing all the documents) unless you are willing to admit that this is what you’re advocating. And you definitely shouldn’t pretend that it’s Snowden, rather than these media outlets, who are making the choices about what gets published in order to demonize him for the latest disclosures you dislike while cowardly refusing to criticize the media outlets that actually made the choice to publish them.

If you want to argue that Snowden bears some responsibility as the leaker, go ahead. But don’t mislead people about who made the choice

that this information ought to be published. It was *the New York Times* – not Snowden – that concluded that the public should know about the NSA’s hacking of Huawei, just as it was *the Washington Post* and not Snowden who decided to publish virtually all of the stories about which [Fred Kaplan complained](#).

(4) The jingoistic view of what is “newsworthy” is baseless and warped. Somewhere along the way, this idea arose that the only “legitimate” disclosures involve ones showing violations of the rights of American citizens. Anything else, this reasoning holds, is invalid, and because Snowden leaked documents that go beyond the violation of Americans’ rights, he is not a legitimate whistleblower.

Who created the uber-nationalistic standard that the only valid disclosures are ones involving the rights of Americans? Are we are all supposed to regard non-Americans as irrelevant? Is the NSA’s bulk, suspicionless surveillance of the private communications of [hundreds of millions of human beings](#) inherently proper simply because [its victims aren’t American citizens](#)? Even more extreme: are American journalists (and whistleblowers like Snowden) supposed to keep the public ignorant of anything and everything the US Government does to people provided those people aren’t blessed with American citizenship? Do you condemn whoever leaked the existence of [top secret CIA black sites to Dana Priest](#) on the ground that it didn’t involve violations of the rights of Americans? It makes sense that US government officials view the world this way: their function is to advance the self-perceived interests of the US government, but that’s not the role of actual journalists or whistleblowers.

The public interest from the Huawei story is obvious. It demonstrates that the NSA has been doing exactly that which the US Government has [spent years vocally complaining is being done by China](#). While the US has been telling the world that the Chinese government is spying on

them through backdoors in Huawei products, it's actually the NSA that has been doing that. It also yet again gives the lie to the claim that the NSA does not engage in economic espionage.

It shows massive deceit and hypocrisy by US officials: with their own citizens and to the world. DOJ official Jack Goldsmith, often a government and NSA defender, understood this point perfectly, [writing yesterday that](#) **"The Huawei revelations are devastating rebuttals to hypocritical U.S. complaints about Chinese penetration of U.S. networks, and also make USG protestations about not stealing intellectual property to help U.S. firms' competitiveness seem like the self-serving hairsplitting that it is."**

If you're a US government official, or a devoted loyalist to the US government, then it makes sense that you'd be angry that has been revealed. Political officials always want their deceit to be concealed rather than exposed, while jingoistic government loyalists (even when they call themselves "journalists") want the same thing. But if you're an actual journalist, or a whistleblower with a conscience, or a citizen who would rather know the truth than be misled by your own government, then this is an easy call. Either way, though, the call in this case – to inform rather than suppress – was made by the reporters and editors of the media outlets which chose to publish this story, so anyone who is angry about it should direct their anger to them.

UPDATE: Brookings' Ben Witten [responds to all of this](#) at Lawfare by, first, agreeing with the main point that those who object to particular NSA stories should direct those criticisms to the newspapers which decide to publish them. But he disagrees that NSA surveillance of foreigners is newsworthy. He argues that "the United States – like all countries that apply law to espionage at all – treats spying domestically and on its own nationals as legally different from spying abroad" and

that such disclosures are driven by “the press’s eagerness to expose *lawful* conduct deemed in the national interest by the democratically elected representatives of the people.”

But there is a huge difference between spying on what are generally regarded to be legitimate foreign targets (political and military officials of adversary governments) and collecting the private communications of entire populations *en masse*. It’s untenable to claim that bulk surveillance has been democratically ratified given that almost all Americans, [even most members of Congress](#), were completely unaware that any of this was happening until we reported it. One can’t reasonably claim that a government program which almost nobody knew about has been democratically approved.

More to the point: mere legality is insufficient to shield a program from justifiable transparency; conversely, exposure of illegality is not the only form of valid reporting. Take the classic whistleblowing case of the Pentagon Papers: those documents really did not reveal illegality as much as they revealed government deceit, systematic lying to the American people about the Vietnam War. The fact that such official lying may have been legal hardly means that it should have remained concealed.

The fact is that American law imposes almost no restrictions on what the US Government is permitted to do to non-Americans, but that does not mean that all such conduct should be off-limits from media reporting just because it has been legalized. Drone strikes that [kill innocent people](#) are arguably legal because Congress has approved them, and are often concealed from the public through an abuse of secrecy rules: does that mean journalists should refrain from reporting them? After all, such reporting “exposes [arguably] *lawful* conduct deemed in the national interest by the democratically elected representatives of the people.”

Having the US government subject the entire world to a system of suspicionless [collect-it-all surveillance](#) goes far beyond what was known or expected or approved; it goes far beyond what is common. It has profound implications for all sorts of critical values. The fact that American law does not prohibit it does not remotely mean that citizens should be kept ignorant that it is happening. Independently, the notion that the US Government should be permitted by journalists to deceive its citizenry – by, for instance, pretending that it is China rather than itself engaging in this form of industrial espionage – simply because such deceit is “legal” is entirely noxious to the most basic tenets of what journalism should be.

WAIT! BEFORE YOU GO about your day, ask yourself: How likely is it that the story you just read would have been produced by a different news outlet if The Intercept hadn’t done it?

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